Supreme Court, U.S.
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No.92-14

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

IN RE: PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE, DEBTOR

MARTIN ROCHMAN, EDWARD KAUFMAN and
ROBERT C. RICHARDS

Petitioners

- v.-

NORTHEAST UTILITIES SERVICE COMPANY and
OFFICIAL COMMITTEE OF EQUITY
SECURITY HOLDERS

Respondents,

PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Petitioners Martin Rochman, Edward Kaufman and Robert Richards ("RKR") hereby reply to the brief submitted by Northeast Utilities Service Company ("NUSCO"), Public Service Company of New Hampshire ("PSNH"), the Official Committee of Equity Security Holders (the "Equity Committee") and the Official Committee of Unsecured Creditors (the "Creditors Committee") (hereinafter referred to jointly as the "Respondents") and the separate brief submitted by the State of New Hampshire (the "State").

DISCUSSION

The Court of Appeals Did Not Properly Apply Existing Case Law When It Dismissed RKR's Appeal

The Respondents claim that RKR is asking the Court to excuse them from the requirements of existing case law, but that is not true.

It is clear that an appeal of a confirmation order should be dismissed if the order has been implemented and as a consequence, it is impossible for the courts to grant equitable relief. RKR does not dispute that rule, but RKR does dispute whether that rule can be properly applied to their appeal.

In all probability, RKR's success will result in an increase in the value of the estate and a distribution of the additional value to the impaired classes in some equitable manner. No innocent third person that has relied on the confirmation order will be injured, and every holder of interests in PSNH including the common stockholders will be better off or at least no worse off.

RKR can not guarantee that result but since all of the prudency audits done on the plant concluded that at least 75% of the investment was prudent

it is a virtual certainty.[1]

Of course, it is possible that some person might appear in the Seabrook rate

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[1]The State says that RKR is wrong because regardless of whether PSNH has the right to recover its prudent investment, PSNH said that it would not have asked to recover more than $1.8 billion of Seabrook, the amount reflected on its financial statements (but not its rate-making books) and the additional $300 million would not have covered the additional interest costs that would accrue during the pendency of the rate case. But Management's statement is not binding on PSNH and if the Confirmation Order is reversed, RKR, and probably the Equity Committee, would insist on PSNH asking to recover much more than $1.8 billion as of January 1, 1990, and with interest until it is fully recovered. And under New Hampshire law (RSA 378:27) PSNH would be entitled to charge temporary rates that recover its prudent investment pending the resolution of the rate case or to apply a surcharge to the permanent rates to recoup the difference.

Also, management's statement was clearly an attempt to curry favor with the State in order to stay in control of PSNH as an investor owned utility and thus a clear breach of its fiduciary obligation to maximize value for the common stockholders and clear evidence that it did not properly represent the stockholders in this proceeding.

case and present some expert testimony that would support a determination that substantially less than 75% of Seabrook was prudent, and thus provide support for a rate order that could result in the common stockholders of PSNH getting less than they got from the Plan but that is surely very unlikely. It is impossible to imagine who would have the resources other than PSNH or the NHPUC to conduct a credible audit and the NHPUC's audit concluded that 93% of the investment was prudent.

If NUSCO had any reason to believe that such a person might appear, it could have presented some testimony to that effect and thereby provided support for a determination that even if PSNH were entitled to recover its prudent investment, PSNH would not necessarily achieve greater value for the common stockholders. But NUSCO failed to pres-

ent any such evidence and therefore it is appropriate to assume that no such testimony would be forthcoming and that, if RKR is successful, PSNH would achieve much greater value in a rate case.

The Court of Appeals refused to make that assumption. It assumed instead that if RKR is successful, PSNH would be back in the bankruptcy court facing essentially the same situation the bankruptcy court thought PSNH was facing when it confirmed the Plan.

The Court of Appeals noted that "appellants' contention that all concerned would be better off if PSNH were to litigate a rate case has been roundly rejected at every turn, in every venue." App. A at 29a. But clearly the Bankruptcy Court confirmed the Plan only because it determined that PSNH did not have the right to recover its prudent investment. Presumably if it had deter-

mined that PSNH had that right, it would not have confirmed the Plan. And if RKR is successful in establishing that PSNH has that right, PSNH would then be in a much better litigating position.

The Respondents argue RKR seeks to revive the many uncertainties that the Plan resolved. But if RKR is successful, they will not revive those uncertainties but settle them even more surely than does the Rate Agreement. [2]

The Rate Agreement was not negotiated on the assumption that PSNH had the right to recover prudent investment. It was negotiated because the State claimed that it had the power to set rates pretty much as it pleased. And

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[2]The institutions that lent money to Reorganized PSNH recognized that the State can not be trusted might renege on the Rate Agreement and made a breach of the Rate Agreement an event of default. But it is surely safe to say that the State will not renege on an obligation mandated by this Court.

the Respondents all supported that claim before the courts because the Plan gave them all what they wanted.

The Plan enabled NU to grab PSNH for a cheap price. The Plan did not give the unsecured creditors all they were contractually entitled to but nevertheless a very good return and probably a better return than they could have gotten from any investment in any other utility in the nation. And the Plan gave the preferred stockholders, especially the holders of the low dividend non-redeemable $100 par preferred that the record indicates dominated the Equity Committee, a very good return. The Plan gave those holders more than they would have gotten if PSNH had recovered all of its investment in Seabrook and had resumed paying dividends on its preferred for then their stock would continue to trade far below par value.

The fact that the Equity Committee chose to allocate the distribution to the preferred in proportion to par value rather than par value plus accrued but unpaid dividends provides irrefutable evidence that the Equity Committee truly represented only the holders of such preferred.

But if RKR is successful, the State will no longer be able to claim that PSNH is not entitled to recover its prudent investment and no one, other than NUSCO and the State, will be willing to accept the result achieved by the Plan. And it is also quite likely that no one else would object to a modification of the Plan along the lines RKR has suggested.

The Respondents say that it is a foregone conclusion that the Equity Committee would object to RKR's proposed modification but of course the Equity

Committee is obliged to say as much at this point. It is simply impossible to believe that, if RKR is successful, the Equity Committee would then object to a proposal that would distribute additional value to the people that it is supposed to represent.

And if RKR is successful the State might very well respond in a rational manner and cause a revived Energy Authority to make a fair offer for PSNH. The Respondents claim that RKR hope to profit by creating a crisis in New Hampshire. But RKR is not trying to create a crisis. RKR is only seeking to require the State to honor its obligations and is merely pointing out how the State can do that and at the same time do its ratepayers a favor.

And RKR's success will not create a crisis. PSNH will continue to operate. The lights will stay on. RKR's success

will result in higher electric rates, if the State does not buy PSNH, but the rates will not cause a death spiral.

If PSNH charged rates designed to recover all of Seabrook in the traditional manner, it might then fall into a death spiral. But the NHPUC is not going to determine that all of the investment was prudent. The audits clearly provide support for a prudency "hit" of some amount. And the NHPUC would cause PSNH to implement a "phase-in" of some sort in any event.

The Respondents say that RKR is asking the Court to declare that the mere assertion of a constitutional right outweighs the interests of thousands of individuals that have relied on the confirmation order. But RKR is not asking for relief based on a mere assertion of a constitutional right. RKR is asking for the opportunity to establish

a constitutional right and if successful for relief based on that right.

If RKR is successful, RKR would expect the Bankruptcy Court, when determining whether and how the Plan should be modified, to balance the injury to the thousands of persons who invested in PSNH in reliance on that constitutional right, with the injury, if any, to the persons that invested in Reorganized PSNH in reliance on the Confirmation Order. And RKR expects, that if the Bankruptcy Court does that, it will find a way to cause the Plan to be modified to provide relief that is equitable to all. Indeed, it is inconceivable that if this Court holds that PSNH has the right to recover its prudent investment, that the Bankruptcy Court would not find a way to cause the parties to agree to a modification of the Plan that is consistent with that right.

In sum, it is clear that it can not properly be said that RKR's appeal is moot because the courts can not grant equitable relief.

But it apparent that the 1st Circuit did not dismiss RKR's appeal because it determined that equitable relief was impossible. It is apparent that it dismissed RKR's appeal because RKR did not make every conceivable effort to get a stay, or as the Respondents put it, because RKR has "unclean hands".

As the Respondents argue, the 1st Circuit looked at RKR as simply three stockholders that care only about their own "parochial" interests and not a whit about the public interest. They argue that if RKR cared more about others, RKR would have more diligently pursued a stay and thereby limited the harm that a reversal would now inflict on innocent

third parties.

But that is patently ridiculous. RKR could not have gotten a stay by merely asking for one and RKR obviously had little if any chance of getting one. RKR could not have put up a bond to cover the possible massive injury to the other parties if RKR's appeal failed and without a bond they could not expect to get a stay on the "mere assertion" of a constitutional right.

And RKR, aware of the dicta that suggested that they must ask for a stay to avoid a dismissal, asked for a stay. They asked the Bankruptcy Court and then the District Court. Their first request to the latter was dismissed for failing to comply with a local rule but their second request was still pending when the Plan was implemented. And when RKR did ask for a stay, the Respondents castigated them for seeking to impose

the risk of severe damages on the impaired classes without offering a bond even though RKR had said that they did not believe they needed a stay and wanted one only if otherwise their appeal would be dismissed.

Clearly, RKR has never sought to injure anyone, not even NU, and if they are successful, they do not expect to. And now that NU has implemented the merger, RKR's success could not possibly harm anyone but NU and NU certainly is not an innocent third party.

And clearly, it is the Respondents and especially NU that have unclean hands. NU negotiated a deal with the State that would take PSNH for the benefit of NU and the State for less than just compensation without regard to the impact of the taking on the common stockholders. And the Respondents issued a Disclosure Statement that told

the impaired classes that they should accept the deal because PSNH would have essentially no rights in a Seabrook rate case. and they have repeated that contention to the Bankruptcy Court, the District Court and the Court of Appeals.

The Respondents have contended throughout this proceeding that Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) means that a state can deny recovery of prudent investment regardless of the impact on the utility and its investors and therefore has essentially unfettered discretion to set rates. Their interpretation obviously goes far beyond what the Court meant in Duquesne and they surely would not be making it if it did not serve their interests in this proceeding. It is simply impossible to believe that they truly believe what they have been arguing and therefore impossible to believe they have been acting in

good faith.[3] And consequently there is no good reason for the Court to be concerned about the impact a reversal might have on NU.

The Respondents claim that it is well established that if an appellant

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[3] After the Confirmation Order had been issued and RKR had filed their appeal, it became apparent that the Disclosure Statement also misrepresented the value of the merger to the impaired classes. It represented that even if the merger were not implemented, the Plan would achieve a value of approximately $2.3 billion and the common stock of Reorganized PSNH would be worth $20 per share. The Respondents subsequently proved to FERC that if the merger were not implemented, the common stock would be worth far less than $20 and FERC approved the merger, despite the fact that it was anti-competitive, because it recognized that only if the merger was implemented would the impaired classes get what they expected from the Plan.

does not make every effort to get a stay, his appeal must be dismissed, and that it is ludicrous for RKR to ask for relief from that rule simply because they did not think they could get a stay.

But there is no case that so holds. The 9th Circuit in In re Roberts Farms, Inc. 652 F.2d 793 (9th Cir. 1981) gave that as an alternative independent basis for its decision but one can not be certain that the 9th Circuit would have dismissed that appeal simply because the appellant had not asked a Justice of the Supreme Court for a stay if it had thought equitable relief was still possible.

RKR is not asking the Court for relief from a well established rule of law. RKR is asking the Court for relief from a decision that establishes an irrational rule that effectively de-

prives RKR of thier right to appeal and that results in a grave injustice.

The decision, if upheld, will be interpreted to mean that even though RKR may have been right on the merits of their appeal, the courts declined to make an effort to grant relief simply because RKR failed to make every conceivable and probably futile effort to get a stay. It will be interpreted to mean that although the State and NU may have conspired to confiscate hundreds of millions of dollars of PSNH's property, the courts simply did not care.

The Respondents and State argue that the Court should not accept RKR's petition because it does not present an issue of broad or recurring significance. But it clearly does.

A rejection of this petition would cause every appellant in every case to make every conceivable effort to get a

stay even if he does not think he needs one or is entitled to one.

More importantly, if the Court rejects this petition so that it can not either now[4] or later rule on the merits, it will give the investor owned utilities reason to believe that this Court does not care what the states do to them and none of them will ever again, for better or worse, invest in anything but the smallest and most conventional technology.

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[4]The Respondents contend that there is not now an adequate record to which to reconsider its holding in Duquesne but RKR is obviously not asking the Court to reconsider its holding in Duquesne and the Court can not be certain that the record will look much different if and when the 1st Circuit affirms the Confirmation Order. And it is certainly important for the welfare of the nation that this Court and not just the 1st Circuit rule on the merits of RKR's appeal and the sooner the better.

CONCLUSION

For the foregoing reasons, RKR's petition should be granted.

Respectfully submitted,

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